Perbadanan Kemajuan Negeri Selangor v Worldwide Holdings Bhd (Shoptra Jaya (M) Sdn Bhd, intervener)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D4–24–333 OF 2006
ABDUL WAHAB PATAIL J
18 MAY 2007

Companies & Corporations — Arrangement, scheme of — Court approval — Opposition by minority shareholders — Whether member proposing arrangement must first obtain approval of other shareholders before making application under s 176 — Whether member had locus to make application for a court convened meeting — Companies Act 1965 s 176

Worldwide Holdings Bhd ('WHB') had on 23 August 2006 announced that PKNS was proposing to implement a scheme of arrangement ('the scheme of arrangement') proposed to be implemented between WHB, PKNS-Federal Furniture International (M) Sdn Bhd ('PFFIM') and the minority shareholders of WHB pursuant to s 176 of the Companies Act 1965. The proposal was to take WHB private via PFFIM, a wholly owned subsidiary of PKNS. PKNS was the majority shareholder of WHB and as at 30 August 2006 held 90,388,990 WHB shares, ie 51.03% of the shares while other shareholders held the balance of 48.97%. The proposal to take WHB private involved: (1) PKNS transferring its entire 51.03% shareholding in WHB to PFFIM ('the proposed share injection'); (2) PFFIM acquiring from WHB minority shareholders all their 48.97% shares in WHB at the price of RM3.50 or the adjusted price per WHB share, as may be applicable, pursuant to the scheme of arrangement; and (3) delisting of WHB. Two shareholders Shoptra Jaya Sdn Bhd ('Shoptra') had written to oppose the application to convene meetings to approve the scheme of arrangement. Shoptra held 200,000 units, or approximately 0.17% of the WHB shares.

When PKNS applied under this originating summons for an order to convene a scheme meeting under s 176 Companies Act 1965, Shoptra filed their summons-in-chambers on 26 September 2006 to intervene into the action inter-alia on grounds that: (1) the usage of the instrument under scheme of arrangement vide s 176 Companies Act 1965 was unlawful and illegal; (2) no prior consultation and approval of the shareholders were sought prior to the application to convene the court convened meeting pursuant to s 176; (3) the respondent, WHB had not safeguarded the rights of the minority shareholders such as the interveners in failing to oppose and/or object the originating summons and opting not to attend the court hearing personally or by counsel and was also done without the prior consultation of the shareholders of WHB; (4) the applicant PKNS being a non-party had no locus to court for an order for the court convened meeting; and (5) the scheme of arrangement was an 'abuse' and a 'coercion' as it forced the WHB minority shareholders to transfer all their WHB shares to PFFIM at a consideration price of RM3.50 or such adjusted price per WHB share.

Held, dismissing the application with costs:

(1) Nothing in s 176 requires a member proposing an arrangement to first consult with or obtain the approval of other shareholders before making an application under s 176. There was no requirement, therefore, for PKNS as a member to conduct such consultation or seek such approval before making this application (see para 8).

(2) The issue in this case was between shareholders inter se, and did not concern WHB whose shares were owned by these shareholders. While this distinction often may not be clear, it was obvious in this case where PKNS held more than 50% of the shares and therefore controlled WHB. It was impractical to require that PKNS appointed directors on WHB must cause WHB which they control and supervise, to undertake protection of the minority shareholders, when they represented PKNS interest to take over all the shares. To keep the rights between shareholders inter se and the company whose shares they hold separate, one could only accurately say that the majority shareholders, and the directors appointed by them, have a duty to respect the rights of minority shareholders (see para 10).

(3) PKNS was a member of WHB. As such member it was entitled to make the application for a court convened meeting in this originating summons in respect of any scheme of arrangement proposed by it as a member of WHB. The objection that PKNS had no locus with regard to a proposal to take WHB private could not stand. That PKNS would transfer its shareholding to PFFIM, a wholly owned subsidiary of PKNS, to be the holder of its shares in WHB did not defeat the fact that at the time of the application PKNS was still the shareholder (see para 17).

(4) The application before this court was made while various other applications for approvals as well as exemptions were outstanding from the administrative authorities. If after an order is granted by the court the scheme could not proceed to the court convened meeting because of a necessary administrative approval or exemption not being obtained, the resources of the court would have been resorted to, and the order of court obtained, in vain. The order of court under s 176 should be sought only after all administrative approvals and exemptions have been obtained, and other preconditions have been satisfied (see para 22).

[Bahasa Malaysia summary

Worldwide Holding Bhd ('WHB') telah pada 23 Ogos 2006 mengumumkan bahawa PKNS telah mengusulkan untuk melaksanakan satu skim penyusunan ('skim penyusunan') yang diusulkan untuk dilaksanakan di antara WHB, PKNS-Federal Furniture International (M) Sdn Bhd ('PFFIM') dan pemegang saham minority WHB menurut s 176 Akta Syarikat 1965. Usul adalah untuk mengambil WHB melalui PFFIM, dimiliki sepenuhnya subsidiari PKNS. PKNS adalah pemegang saham majority WHB dan setakat 30 Ogos 2006 memegang 90,388,990 saham WHB, iaitu 51.03% saham manakala pemegang saham yang lain memegang baki 48.97%. Usul untuk mengambil WHB melibatkan: (1) PKNS memindahkan keseluruhan 51.03% sahamnya di dalam WHB kepada PFFIM ('suntikan saham

yang dicadangkan'); (2) PFFIM mendapatkan daripada pemegang saham majoriti WHB kesemua 48.97% saham mereka dalam WHB pada harga RM3.50 atau harga yang selaras sesaham WHB yang mungkin boleh digunakan menurut skim penyusunan; dan (3) WHB dikeluar senarai. Dua pemegang saham Shoptra Jaya Sdn Bhd ('Shoptra') telah menulis untuk menentang permohonan bagi mengadakan mesyuarat untuk meluluskan skim penyusunan. Shoptra memegang 200,000 unit atau lebih kurang 0.17% saham WHB.

Apabila PKNS memohon di bawah saman pemula ini untuk satu perintah bagi mengadakan satu mesyuarat skim di bawah s 176 Akta Syarikat 1965, Shopra memfailkan saman dalam kamarnya pada 26 September 2006 untuk mencelah ke dalam tindakan antara lain alasannya adalah: (1) penggunaan surat cara di bawah skim penyusunan melalui s 176 Akta Syarikat 1965 adalah menyalahi undang-undang dan tidak sah; (2) tiada rundingan awal dan kelulusan daripada pemegang-pemegang saham diperolehi sebelum permohonan untuk mahkamah bersidang mengadakan mesyuarat menurut s 176; (3) responden, WHB tidak melindungi hak-hak pemegang-pemegang saham minoriti seperti mencelah di dalam kegagalam untuk menentang dan/atau membantah saman pemula dan memilih untuk tidak hadir perbicaraan di mahkamah secara sendiri atau melalui peguam dan juga telah dilakukan tanpa rundingan awal pemegang-pemegang saham WHB; (4) pemohon, PKNS adalah bukan pihak tidak mempunyai locus kepada mahkamah untuk satu perintah bagi mahkamah mengadakan mesyuarat; dan (5) skim penyusunan adalah 'penyalahgunaan' dan satu 'paksaan' yang mana ianya memaksa pemegang-pemegang saham minority WHB untuk memindahkan kesemua sahan WHB mereka kepada PFFIM atas harga balasan RM3.50 atau harga selaras sesaham WHB.

Diputuskan, menolak permohonan dengan kos:

(1) Tiada di dalam s 176 memerlukan ahli yang mengusulkan satu penyusunan untuk berunding dengan atau mendapatkan kelulusan pemegang-pemegang saham yang lain terlebih dahulu sebelum membuat permohonan di bawah s 176. Tidak terdapatnya syarat, oleh itu, untuk PKNS selaku ahli untuk melakukan rundingan atau mendapatkan kelulusan sebelum membuat permohonan ini (lihat perenggan 8).

(2) Isu dalam kes ini adalah di antara pemegang-pemegang saham sahajan dan bukan urusan WHB yang saham-sahamnya dimiliki oleh pemegang-pemegang saham ini. Sementara itu perbezaan ini selalunya tidak jelas, adalah jelas dalam kes ini di mana PKNS memegang lebih daripada 50% saham dan oleh itu mengawal WHB. Adalah tidak praktikal untuk meminta PKNS pengarah yang dilantik ke atas WHB mesti menyebelahi WHB yang mana mereka kawal dan selia, untuk mengakujanji perlindungan pemegang-pemegang saham minoriti, apabila mereka mewakili PKNS yang berminat mengambil alih kesemua saham. Bagi memastikan hak-hak di antara pemegang-pemegang saham sahaja dan syarikat yang dipegang berasingan, hanya boleh dikatakan tepat bahawa pemegang saham majoriti dan pengarah-pengarah yang dilantik oleh mereka, mempunyai tugas untuk menghormati hak-hak pemegang-pemegang saham minoriti (lihat perenggan 10).

(3) PKNS adalah ahli kepada WHB. Sebagai ahli ianya berhak untuk membuat permohonan bagi mahkamah mengadakan mesyuarat di dalam saman pemula ini berkenaan dengan apa sahaja skim penyusunan yang dicadangkan olehnya sebagai ahli WHB. Bantahan bahawa PKNS tidak mempunyai locus berkenaan dengan usul untuk mengambil WHB tidak kukuh. Bahawa PKNS memindahkan pegangan sahamnya kepada PFFIM, milik penuh subsidiari PKNS sebagai pemegang sahamnya di WHB tidak menggagalkan fakta bahawa pada masa permohonan PKNS masih pemegang saham (lihat perenggan 17).

(4) Permohonan di hadapan mahkamah ini dibuat semasa pelbagai permohonan lain untuk kelulusan begitu juga dengan pengecualian masih belum selesai daripada pihak berkuasa pentadbiran. Jika selepas satu perintah diberikan oleh mahkamah skim tidak boleh diteruskan untuk mahkamah mengadakan mesyuarat kerana kelulusan atau pengecualian pentadbitan yang perlu tidak diperolehi, kebergantungan mahkamah akan menjadi jalan terakhir juga, dan perintah mahkamah yang diperolehi akan sia-sia. Perintah mahkamah di bawah s 176 seharusnya dipohon hanya selepas kesemua kelulusan dan pengecualian pentadbiran telah diperolehi dan prasyarat yang lain telah dipenuhi (lihat perenggan 22).]

Notes

For cases on court approval, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 25–28.

Cases referred to

Australian Securities Commission v Marlborough Gold Mines Ltd [1993] 112 ALR 627 (refd)
NFU Development, Re [1973] 1 All ER 135 (refd)
NRMA Ltd, Re [2000] 33 ACSR 595

Legislation referred to

Companies Act 1965 ss 176, 180
Securities Commission Act 1993

LK Mak (SY Son & S Suhendran with him) (Kadir, Andri & Partners) for the applicant.
G Ravi (R Thayakugan with him) (Ravi Beltran & Co) for the intervener.

Abdul Wahab Patail J:

[1] Perbadanan Kemajuan Negeri Selangor ('PKNS') has by this originating summons applied for an order to convene a scheme meeting under s 176 of the Companies Act 1965 (s 176).

[2] Worldwide Holdings Bhd ('WHB') had on 23 August 2006 announced that PKNS is proposing to implement a Scheme of Arrangement ('the Scheme of Arrangement') proposed to be implemented between WHB, PKNS-Federal Furniture International (M) Sdn Bhd ('PFFIM') and the minority shareholders of Worldwide Holdings Bhd ('WHB MI Shareholders') pursuant to s 176.

A **[3]** The proposal was to take WHB private via PFFIM, a wholly owned subsidiary of PKNS. PKNS is the majority shareholder of WHB and as at 30 August 2006 held 90,388,990 WHB Shares, ie, 51.03% of the shares while other shareholders held the balance of 48.97%.

B **[4]** The proposal to take WHB private involves:

(a) PKNS transferring its entire 51.03% shareholding in WHB to PFFIM ('the proposed share injection'); and

(b) PFFIM acquiring from WHB MI Shareholders all their 48.97% shares in WHB at the price of RM3.50 or the adjusted price per WHB Share, as may **C** be applicable, pursuant to the scheme of arrangement

(c) Delisting of WHB.

[5] Two shareholders Shoptra Jaya Sdn Bhd ('Shoptra') have written to oppose the **D** application to convene meetings to approve the Scheme of Arrangement ('the scheme'). Shoptra holds 200,000 units, or approximately 0.17% of the WHB shares.

[6] When Perbadanan Kemajuan Negeri Selangor ('PKNS') applied under this **E** originating summons for an order to convene a scheme meeting under s 176 of the Companies Act 1965, Shoptra filed their summons in chambers on 26 September 2006 to intervene into the action, inter alia, on grounds that:

(a) the usage of the instrument under scheme of arrangement ('SOA') vide s 176 of the Companies Act 1965 ('CA') is unlawful and illegal;

F (b) no prior consultation and approval of the shareholders were sought prior to the application to convene the court convened meeting pursuant to s 176 of the Companies Act 1965;

(c) the respondent, WHB had not safeguarded the rights of the minority shareholders such as the interveners in failing to oppose and/or object the **G** originating summons and opting not to attend the court hearing personally or by counsel and was also done without the prior consultation of the shareholders of WHB;

(d) the applicant PKNS being a non-party has no locus to court for an order for the court convened meeting; **H**

(e) The scheme of arrangement is an 'abuse' and a 'coercion' as it forces the WHB minority shareholders to transfer all their WHB shares to PFFTM at a consideration price of RM3.50 or such adjusted price per WHB Share.

I **[7]** Section 176 of the Companies Act 1965 provides:

176. Power to compromise with creditors and members —

(1) Where a arrangement is proposed.... between the company and its members or any class of them the court may on the application in a summary way *of the company or member*

> *of the company*, …, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the court directs.

[8] Nothing in s 176 requires a member proposing an arrangement to first consult with or obtain the approval of other shareholders before making an application under s 176. There is no requirement, therefore, for PKNS as a member to conduct such consultation or seek such approval before making this application.

[9] However, the words 'arrangement is proposed... between the company and its members or any class of them...' in s 176 does require that there be not only in existence a scheme of arrangement, but that it has also been proposed. That requirement exists so that rf the other shareholders agreed, there would be no necessity to resort to application to the court for a court convened meeting. It is to avoid commencing unnecessary proceedings in court and taking up the time and resources of the court. Entertaining an application that ignores such requirement would defeat the purpose.

[10] The issue in this case is between shareholders inter se, and does not concern WHB whose shares are owned by these shareholders. While this distinction often may not be dear, it is obvious in this case where PKNS holds more than 50% of the shares and therefore controls WHB. It is impractical to require that PKNS appointed directors on WHB must cause WHB which they control and supervise, to undertake protection of the minority shareholders, when they represent PKNS interested to take over all the shares. To keep the rights between shareholders inter se and the company whose shares they hold separate, one could only accurately say that the majority shareholders, and the directors appointed by them, have a duty to respect the rights of minority shareholders.

[11] That s 176 applies also to applications for an order to hold a court convened meeting to consider a scheme of arrangement proposed by a member of a company is well established. The word 'arrangement' is construed liberally: *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] 112 ALR 627, p 636. Any arrangement which touches the rights and obligations of the company or its members may come under s 176: *Re NRMA Ltd* [2000] 33 ACSR 595, p 603.

[12] The key feature of a court convened meeting under s 176 is set out in sub-s (3) thereof:

> (3) If a majority in number representing three-fourths in value of the … members or class of members present and voting either in person or by proxy at the meeting … agrees to any compromise or arrangement the compromise or arrangement shall if approved by order of the Court be binding on all … the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

[13] In *Re NFU Development* [1973] 1 All ER 135 at p 140, it was explained the object of the section is not confiscation, and there must be something analogous to

consideration to support the participation of all sides in the arrangement. Generally, before it exercises its discretion to order a court convened meeting under s 176(1) of the Act, the court will consider whether:

(a) The Scheme proposed to be undertaken is fair and reasonable: *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1990] 2 MLJ 31, p 33.

(b) The scheme was cast in the terms such that it is likely to be approved at the shareholders' meeting and whether the court was likely to sanction it at the subsequent application: *Sri Hartamas Development Sdn Bhd v MBF finance Bhd* [1990] 2 MLJ 31, p 35; *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2)* [1993] 2 MLJ 353, p 358; *Re Sonodvne Internation Ltd* [1994] 15 ACSR 494, p 497.

[14] The approval of the scheme by the resolution of the board of the company or by the company at the general meeting is a relevant consideration as to whether the scheme of arrangement proposed is fair and reasonable and likely to be approved in the shareholders' court convened meeting.

[15] The reason for resort in this case to s 176 is stated by PKNS at p 11 at para 37:

> 37. The application under s 176 is necessary as it would be impracticable to obtain the consent of all shareholders interests are affected by the scheme of arrangement, which would otherwise be required before the scheme of arrangement could be implemented. In this respect, the 'Scheme Paper' will constitute the statutory contract between WHB, the shareholders of WHB and PFFIM upon sanction by this honourable court...

[16] The intention of the application under s 176 is clearly to be able, with the sanction of the court, to take over all of the WHB shares held by minority shareholders at RM3.50 being the consideration proposed by PKNS or such adjusted price as may be applicable, by proceeding in due course if necessary to the provisions of s 180 of the Companies Act 1965.

[17] The PKNS is a member of WHB. As such member it is entitled to make the application for a court convened meeting in this originating summons in respect of any scheme of arrangement proposed by it as a member of WHB. The objection that PKNS has no locus with regard to a proposal to take WHB private cannot stand. That PKNS would transfer its shareholding to PFFIM, a wholly owned subsidiary of PKNS, to be the holder of its shares in WHB does not defeat the fact that at the time of the application PKNS is still the shareholder.

[18] The scheme of arrangement as proposed is a takeover of WHB. But it is not a direct takeover by PKNS:

> 22. PKNS is not a proposed party to the scheme of arrangement as it will have to transfer all its WHB shares to PFFIM prior to the scheme of arrangement becoming effective.

[19] Whether it is described as through PFFIM, or using PFFIM as a vehicle, the takeover is in law a takeover by PFFIM. It is only indirectly by PKNS. Indeed the above goes further in stating directly PKNS is not a proposed party to the scheme of

arrangement As such the application for takeover ought to be made by PFFIM, which cannot do so under s 176 since it is not a member of WHB.

[20] This application by PKNS before the court, being in fact by the majority shareholder to obtain a court order for a court convened meeting for another legal entity to acquire its shares and the shares of the minority shareholders in WHB. It is not a scheme of arrangement envisaged under s 176.

[21] WHB is furthermore a public listed company. In respect of public listed companies, specific laws have been put into effect The purpose is to obtain and maintain the confidence of investors to purchase shares in public listed companies as minority shareholders. While if no specific legislation had been enacted for public listed companies s 176 could apply, the fact of specific legislation requires having been enacted means that the specific legislation must be applied. For this reason the Securities Commission Act 1993, specifically applying to takeovers of public listed companies must be adhered to. Even if it is argued there are inadequacies in the provisions, that issue is properly addressed in the context of an application or action made under that legislation.

[22] The application before this court was made while various other applications for approvals as well as exemptions are outstanding from the administrative authorities. If after an order is granted by the court the scheme cannot proceed to the court convened meeting because of a necessary administrative approval or exemption not being obtained, the resources of the court would have been resorted to, and the order of court obtained, in vain. The order of court under s 176 should be sought only after all administrative approvals and exemptions have been obtained, and other preconditions have been satisfied.

[23] For the reasons above, the application by the applicant is dismissed with costs.

Application dismissed with costs.

Reported by Loo Lai Mee